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No. _____

In The
Supreme Court of the United States

FIDEL GONZALEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether the provisions of the Sentencing Reform Act indicate that Congress did not intend that acquitted conduct should always be treated the same as convicted conduct.

II. Whether the Sentence in this case, which was significantly enhanced for acquitted conduct, is unreasonable because the District Court failed to Consider properly the statutory purposes in 18 U. S. C. § 3553(a).

PARTIES TO THE PROCEEDINGS

Petitioner, Fidel Gonzalez, was a criminal defendant in the United States District Court for the Middle District of Florida, Ft. Myers Division in USDC Case No.2:05-CR-119-FTM-29DNF and an Appellant in the United States Court of Appeals for the Eleventh Circuit in USCA No. 07-13914-GG. Respondent, United States of America, was the plaintiff in the District Court and Appellee in the United States Court of Appeals for the Eleventh Circuit.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Eleventh Circuit filed in this case on May 28, 2008 affirming Petitioner's conviction and sentence.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Eleventh Circuit is unpublished, but can be found at *United States v. Gonzalez,* USCA No. 07-13648-GG (11th Cir. May 28, 2008) and is attached in the Appendix.

STATEMENT OF JURISDICTION

Petitioner appealed from a final Judgment of conviction to the United States Court of Appeals for the Eleventh Circuit. The Court of Appeals rendered its unpublished Opinion on May 28, 2008 affirming the Judgment of the district court entered on July 31, 2007, Hon. John E. Steele presiding. This Court has jurisdiction pursuant to Title 28, United States Code, §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth and Sixth Amendments.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district

> wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Statutory, 18 U.S.C. § 3553(a).

STATEMENT OF THE CASE

A. The Proceedings Below

On June 29, 2006, a Federal Grand Jury in the Middle District of Florida, Ft. Myers Division returned a Superseding Indictment charging defendants Carlos Gonzalez and Fidel Gonzalez and others in Count 1of Conspiracy to Possess 1000 marijuana plants with Intent to Distribute them in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B)(vii) and 21 U.S.C. § 846, and in Count 2 of Possession of 1000 marijuana plants with Intent to Distribute them in violation of 21 U.S.C. § 841(a)(1), (b)(1)(B)(vii) and 18 U.S.C. § 2. (D. E. 73).[1]

On March 13, 2007, a seven (7) day Jury Trial commenced.(D. E. 177).

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[1] "D. E." refers to the U. S. District Court Docket Report Entry which is immediately followed by the Entry number and Page number when referring to a Transcript.

On March 22, 2007, the Jury returned a Verdicts of guilty on Count 1 and not guilty on Count 2 as to Fidel Gonzalez.(D. E.191).

On July 31, 2007, Fidel Gonzalez was sentenced to 120-months imprisonment,5-years Supervised Release, a Mandatory Assessment Fee of $100 and a Money Judgment of $1,290,000.(D. E. 225).

On August 10, 2007, Fidel Gonzalez filed a timely Notice of Appeal.(D. E. 231).

On May 28, 2008, the United States Court of Appeals for the Eleventh Circuit affirmed Fidel Gonzalez's conviction and Sentence. (D. E. 257).

On July 16, 2008, Fidel Gonzalez timely filed a Petition for Rehearing.

On August 4, 2008, the Petition for Rehearing was Denied by the Eleventh Circuit.

B. <u>The Factual Background</u>

The government's conspiracy case rested almost entirely on the testimony of eight (8) cooperating witnesses who pled guilty to Count 1 or 2 of the Indictment. Marijuana plants were seized from the homes of the cooperating witnesses.[2] There was one photo, admitted over defense objection, of Carlos

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[2] The cooperating witnesses were Armando Garcia, Osvaldo Alonso, Gilberto Perez, Ignacio Castillo, Jr., Ignacio Castillo, Sr., Jose Pupo, Jose Ruperto Gonzalez, Carlos Gonzalez Hernandez and Ernesto Castillo.

Andres Gonzalez standing next to some marijuana plants.

The prosecutor described the investigation as falling into four (4) distinct phases. Phase I was the arrest of Ernesto Castillo in Miami and his cooperation with State authorities. Phase II involved Ignacio Castillo and other persons who were arrested. Phase III involved Osvaldo Alonso and Gilberto Perez. And Phase IV involved both Fidel Gonzalez and Carlos Andres Gonzalez. (D. E. #204).

Much of the testimony at trial consisted of detectives describing the unfolding investigation from Miami [referencing Count-1, the Conspiracy charge] to Cape Coral [referencing Count-2, the substantive Possession charge] followed by evidence from the cooperating witnesses of their participation in the cultivation and distribution of marijuana plants.

As described in the prosecutor's opening statement, (D.E.# 204), in June 2004, Ernesto Castillo was arrested in Miami in connection with a marijuana grow house where 64 marijuana plants were found. He was charged with the cultivation of marijuana. In April 2005, he entered into a cooperation agreement with the State of Florida.

State authorities began an investigation into others who were growing marijuana in Miami-Dade County. Ernesto Castillo met with detectives in Cape Coral, Florida and drove around with them; identifying houses associated with the marijuana grow organization. He pointed out three houses where he had helped set up marijuana grow rooms.

Later that month, search warrants were executed on seven homes in the Cape Coral area, producing 622 marijuana plants in varying stages of development. Police arrested ten people listed in the footnote.[3]

After his arrest in Cape Coral, Ignacio Castillo also agreed to cooperate with law enforcement authorities. (D.E. #204:125). He named Fidel Gonzalez as the person who was responsible for placing people in the houses to grow marijuana. Fidel did not own any of the houses. (D.E.# 204:126). Ignacio Castillo owned four homes in the Cape Coral area.

Gilberto Perez was a friend of Carlos Andres Gonzalez in Cuba. He testified that Carlos Andres Gonzalez taught him how to cultivate marijuana plants and paid him to harvest by the pound. (D.E.# 205:347). He harvested 50-60 plants three times at a house in Carol City, Florida. (D.E.# 205:349).

Gilberto Perez incriminated Fidel Gonzalez in several respects. He testified that Fidel had knowledge of how to conduct a marijuana business, that he gave him money to buy the house, and that he brought people to the house to set up the indoor grow room. (D.E.# 205:353). Further, Fidel and Carlos helped him

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[3] Ignacio Castillo (cousin of Ernesto Castillo) and his common law wife, Yusimi Hernandez; Carlos Gonzalez Hernandez (the uncle of Carlos Andres Gonzalez); Rafael Lopez (the brother-in-law of Ignacio Castillo); Jose Ruperto Gonzalez (the father of Carlos Andres Gonzalez); Arlenee Sanchez (the mother of Yusimi Hernandez); Ignacio Castillo, Sr. (the father of Ignacio Castillo); Hilga Castillo (the mother of Ignacio Castillo); Jose Pena Pupo; and Armando Garcia. (D.E.# 204:124).

set up a second grow operation in Homestead, Florida in 2003. (D.E.# 205:354).

The person who lived in the Homestead house was Carlos Andres Gonzalez's father Jose Ruperto Gonzalez. He became the caretaker of the plants there and harvested approximately 40 plants three times. (D.E.# 205:359-360). The Homestead house had a fourth harvest of 40 plants after Jose Gonzalez left and Jose Pupo took over. (D.E.# 205:365).

Perez sold the Homestead house and moved to Cape Coral in April 2004. (D.E.# 205:367). The new house was financed with money from Fidel and Carlos. Carlos Gonzalez brought people to set up the grow operation in the garage, where they planted 14 plants. (D.E.# 205:367-369). There was one harvest at this Cape Coral house. (D.E.# 205:371)

Jose Gonzalez testified that he took over in Homestead when Gilberto Perez left the Homestead house. He oversaw the cultivation of three crops that were successfully harvested. The three crops consisted of 60, 32, and 60 plants. (D.E.# 205:439). (D.E.# 205:443). Fidel Gonzalez controlled the money. (D.E.# 205:446). He also claimed that his son, co-Defendant Carlos Andres Gonzalez, was a partner with Fidel Gonzalez. (D.E.# 205:451)

Osvaldo Alonso testified that he spoke with Fidel Gonzalez about getting into the marijuana grow business. (D.E.# 206:613). Workers sent by Fidel came to his house to build a grow room; and he successfully harvested 66 plants at his house in Homestead. (D.E.# 206:619-620)

Alonso bought two houses in Cape Coral which were adapted for the indoor cultivation of marijuana. (D.E.# 207:634). Fidel Gonzalez made some initial payments to him; later he was paid by Carlos Andres Gonzalez, as Alonso had stopped working for Fidel. (D.E.# 207:640).

Carlos Gonzalez Hernandez, the uncle of Defendant Carlos Andres Gonzalez, testified that he took care of plants in Cape Coral. (D.E.# 207:726). He twice harvested 62 plants. (D.E.# 207:726). He testified that Fidel came with his nephew on one occasion to see the plants. (D.E.# 207:729). He did not know if Fidel Gonzalez was involved in the marijuana business. (D.E.# 207:730).

Ignacio Castillo grew marijuana plants in the garage of his house on (D.E.# 208:791). S.W. 122 Place. (D.E.# 208:776). Andy and Fidel taught him how to grow the plants. (D.E.# 208:777). He had three harvested crops of 54 or 55 plants each. (D.E.# 208:780). The harvesting was done by a group of people brought to the house by Fidel. (D.E.# 208:784). He also harvested three crops of 20, 26 or 27 and 30 plus plants in a house at 414 N.W. 19th Terrace in Cape Coral, Florida.[4] (D.E.# 208:791).

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[4] There was another harvest of 17-20 plants at 2402 S.W. 32nd Street that did not involve Fidel. That business deal was between Ignacio and Carlos Andres Gonzalez. (D.E.# 208:797). Ignacio bought the houses in Cape Coral with his own money.

REASONS FOR GRANTING THE WRIT

I. The provisions of the Sentencing Reform Act indicate that Congress did not intend that acquitted conduct should always be treated the same as convicted conduct.

II. The Sentence in this case, which was enhanced for acquitted conduct, is unreasonable because the District Court failed to Consider properly the statutory purposes in 18 U. S. C. § 3553(a).

Under the guise of "judicial discretion," there is a sentencing regime that allows the government to try its case not once but twice. The first time before a jury; the second before a judge.

Before the jury, the government must prove its case beyond a reasonable doubt. But if it loses on some counts, that matters little. Free of the Federal Rules of Evidence, most constitutionally-imposed procedures, and the burden of proving any critical facts beyond a reasonable doubt, the government gets the proverbial "second bite at the apple" during sentencing to essentially retry those counts on which it lost. With this second chance at success, the government almost always wins by needing only to prove its (lost) case to a judge by a preponderance of the evidence. See *McMillan v. Pennsylvania*, 477 U.S. 79, 91-92 (1986) (due process generally satisfied when Government proves a sentencing enhancement by a preponderance of the evidence). Permitting a judge to impose a sentence that reflects conduct the jury expressly disavowed through a finding of 'not guilty' amounts to more than mere second-guessing of the jury — it entirely trivializes its principal fact-finding function.

But no less significant, this judicial fact-finding deprives a defendant of adequate notice as to his or her possible sentence. This state of affairs is unfair, unjust and plain unconstitutional. Though the government might have "won" everyone and everything else — the defendant, the jury system, the Constitution —looses.

In the last decade, this Court has reaffirmed the jury's central role in the criminal justice system. See, e.g., *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Ring v. Arizona*, 536 U.S. 584 (2002); *Blakely v. Washington*, 542 U.S. 296 (2004); *United States v. Booker*, 543 U.S. 220 (2005). Rather than pretending as if these cases were never decided, federal judges should acknowledge their clear implication: A judge violates a defendant's Sixth Amendment rights by making findings of fact that either ignore or countermand those made by the jury and then relies on these factual findings to enhance the defendant's sentence. *Cf. United States v. Mercado*, 474 F.3d 654, 658 (9th Cir. 2007) (Fletcher, B., J., dissenting) ("Reliance on acquitted conduct in sentencing diminishes the jury's role and dramatically undermines the protections enshrined in the Sixth Amendment."); *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., specially concurring) ("I strongly believe . . . . that sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment."); *United States v. Ibanga*, 454 F. Supp. 2d 532, 536 (E.D. Va. 2006) (Kelley, J.) ("Sentencing a defendant to time in prison for a crime that the jury found he did not commit is a Kafka-esque result."); *United States v. Pimental*, 367 F. Supp. 2d 143, 153 (D.Mass. 2005) (Gertner, J.) ("To tout the importance of the jury in deciding facts, even traditional sentencing facts, and then to ignore the

fruits of its efforts makes no sense — as a matter of law or logic.").

In allowing the acquitted conduct by jury verdict to serve as a basis to enhance Fidel Gonzalez's sentence violates the Sixth Amendment and is unconstitutional. Further, that in doing so, demonstrates that a sentence based on acquitted conduct may well promote disrespect for the law, and thereby violate the statutory provision of 18 U.S.C. § 3553(a).

I. THE PROVISIONS OF THE SENTENCING REFORM ACT INDICATE THAT CONGRESS DID NOT INTEND THAT ACQUITTED CONDUCT SHOULD ALWAYS BE TREATED THE SAME AS CONVICTED CONDUCT.

Sentencing range enhancements based on facts alleged in charges of which a defendant has been acquitted ("acquitted conduct") have long been among the most controversial features of the Federal Sentencing Guidelines, in part because acquitted conduct enhancements effectively nullify the jury's determination in a criminal case. In *United States v. Watts,* 519 U.S. 148 (1997), the Supreme Court addressed this issue in a limited way when it held that consideration of acquitted conduct at sentencing does not violate the Double Jeopardy Clause. But now that more recent Supreme Court rulings have stressed the constitutional importance of jury determinations in the sentencing enterprise, the constitutionality of acquitted conduct enhancement under the Fifth and Sixth Amendments is questionable. In this Petition for Certiorari, Fidel Gonzalez argues in detail that acquitted conduct enhancements violate the Constitution.

In addition to any constitutional infirmities, acquitted conduct enhancements raise distinct statutory concerns. *United States v. Booker,* 543 U. S. 220 (2005), and its progeny stress that, because the Guidelines are now advisory, the directions that Congress set forth in the Sentencing Reform Act ("SRA"), and particularly the text of 18 U.S.C. § 3553(a), provide the ultimate instructions for sentencing decision-making by district and appellate courts. Acquitted conduct enhancements in some cases . . . especially when they significantly affect the applicable Guideline range and the ultimate sentence imposed . . . may deserve the statutory purposes of sentencing that Congress enumerated in 18 U.S.C. § 3553(a) and sought to vindicate in the SRA.

There currently exists a parallel pending cause reargued *En Banc* before the United States Court of Appeals for the Sixth Circuit styled *United States v. White,* No. 05-6596 from which the majority of the language and argument has been applied herein.

In the case at bar, Fidel Gonzalez's Base Offense Level under the Guidelines per Count-1should have been a sole independent function of the 916 marijuana plants [from the Miami marijuana harvest attributed to the Count-1 Conspiracy] per Paragraph 38 of the Presentence Report. As such, Fidel Gonzalez's Base Offense Level for 80-100 kilograms of marijuana would yield a Level 24. This number combined with the Leader/organizer 4 level adjustment yields a Total Offense Level of 28 in Criminal History Category I with a Guideline range of 78-97-months. However, and of serious note, is the stark issue that the government's pleadings in Count-1 of the Indictment reflect that Fidel Gonzalez was charged with

Conspiracy to Possess with Intent to Distribute "more than one thousand (1000) marijuana plants . . ." Even though trial counsel failed to proffer a Rule 29(a) F. R. Cr. P. Motion for Instructed Verdict of Acquittal; it should have been glaringly obvious to the district court that a *sua sponte* Motion for same was in order to protect both the defendant and the record. This was not done.

The district court failed to adequately examine whether the sentence complied with the SRA and, in particular, the statutory purposes of sentencing. Instead, the court reflexively treated acquitted conduct in the same way as convicted conduct without properly considering whether the enhancement would promote respect for the law and provide just punishment for the convicted offense. Fidel Gonzalez's conviction and sentence should, therefore, be vacated and remanded.

The relevant conduct Guideline promulgated by the Sentencing Commission, U.S.S.G. § 1B1.3, has generally been interpreted to require the treatment of acquitted conduct in exactly the same fashion as convicted conduct, no matter how much weaker the evidence (so long as it is proven by a preponderance of the evidence) or how factually and temporally distinct the conduct from the offense of conviction. However, the express text of the SRA indicates that Congress did not intend that result. "although Congress likely expected that judges would still have authority in a Guidelines system to consider some uncharged conduct at sentencing, the text and goals of the SRA suggest that Congress did not intend or seek that Guideline sentencing ranges would be automatically enhanced for conduct underlying offenses charged but formally rejected by a jury through an acquittal.

Both the Plain Text and the Legislative History of 18 U.S.C. § 3553(a) Indicate that Congress Intended Sentencing Judges to Focus Primarily upon Conduct for Which Defendants Have Been Found Guilty.

In *Watts,* this Court found that 18 U.S.C. § 3661 codified a "longstanding principle that sentencing courts have broad discretion to consider various kinds of information." *Watts,* 519 U. S. at 151. But while the language of § 3661 precludes a "blanket prohibition" on considering certain types of evidence at sentencing, other provisions indicate that Congress did not intend courts to rely on acquitted conduct in every case in exactly the same manner as convicted conduct. To the contrary, the precise text selected by Congress in the SRA – both in provisions directed at the Commission (in Title 28) and directed at courts (in Title 18) – indicates that sentences should be based principally on the offense for which a defendant is convicted, with at most limited case-by-case consideration of acquitted conduct.

The word "offense", which appears repeatedly in the SRA, was used by Congress as a specific reference to the offense of conviction. For example, 18 U.S.C. § 3551, which describes the scope of the SRA's provisions, tellingly refers only to defendants who have "been found guilty of an offense." Because being "found guilty" results in conviction, the phrasing here makes clear that the word "offense" refers to the **actual** offense of conviction. Moreover, in provisions directing how the Commission should punish multiple instances of criminal misconduct, Congress authorized incremental punishment only "in a case where a defendant is convicted of" multiple criminal offenses.

28 U.S.C. § 994(*l*)(1). See S. Rep. No. 225, 98th Congress, 2d Session at 176-77 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3359-60 (reiterating that the Commission's Guidelines should reflect the appropriateness of imposing an incremental penalty for each of multiple offenses of which a defenant is "convicted".[5]

Furthermore, § 3553(a) repeatedly instructs judges to consider matters related to "the offense" in a manner that clearly refers to the offense of conviction. See 18 U.S.C. § 3553(a)(2)(A)(instructing judge to consider the need for the sentence to "reflect the seriousness of the offense" and to "provide just punishment for the offense"); *Id.* § 3553(a)(7) (instructing judges to consider need for restitution for "any victims of the offense"). Similarly, in this key statutory provision, Congress directed sentencing courts to concern themselves with a specific type of disparity– the "unwarranted" disparity that may arise for "defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). Both the express text and overall structure of 18 U.S.C. § 3553(a) indicate that Congress intended and expected sentencing judges to be focused principally on

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[5] In a revealing comment, the Senate Report advised that, "to the extent feasible, the sentences for each of the multiple offenses [should] be determined separately and the degree to which they should overlap be specified. Under this approach, if the conviction for one of the offenses is overturned, it will be unnecessary to recalculate the sentence." *Id.* at 176-77; 3359-60. The implication of this statement is that, for a defendant who has multiple offenses, if any individual conviction is overturned, that offense would automatically be excluded from the resulting sentencing re-calculation.

offenses of conviction. *Cf. United States v. Eurer*, 463 F. 3d 792, 793 (7th Cir. 2006)(suggesting that reference to "the offense" in § 3553(a) concerns "the [actual] offense of conviction").[6]

Thus, while congress may have authorized judges in individual cases to take acquitted conduct into account in a limited fashion, there are strong indications that it did not endorse or expect that Guideline calculations would rotely assign acquitted conduct the same significance and weight as convicted conduct.[7]

A Sentencing Enhancement Based on Acquitted conduct May Deserve the Statutoty Purposes of Punishment, and a District Court Must therefore Consider Carefully Such an

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[6] In contrast to the SRA's references to defendants having "been found guilty" or being "convicted of" certain offenses, the text of the SRA has no direct references to acquitted conduct. Had Congress intended or sought for acquitted conduct to be a regular and integral component of Guideline calculations, it likely would have made clear this view by using phrases like "has committed" and "responsible for" instead of the chosen phrases of "been found guilty" and "convicted of". See *United States v. James*, 478 U.S. 597, 604 (1986); *Ford v. United States*, 273 U. S. 593, 611-12 (1927).

[7] This Court has instructed that statutory construction "should go in the direction of constitutional policy even though not commanded by it." *United States v. Johnson*, 323 U.S. 273, 276 (1944). As Judge Friendly explained, "the Constitution is itself a datum in the interpretation of a statute." Henry J. Friendly Benchmarks 210 (1967). Accordingly, to the extent that the meaning of "offense" is ambiguous, the appropriate course is to interpret the SRA in a way that furthers the central role of the jury in sentencing as required by *Apprendi*, *Blakely*, and *Booker*.

Enhancement in Light of the Requirements of 18 U.S.C. § 3553(a).

Courts must seriously consider the Defendant's Sentence in the light of 18 U. S. C. § 3553(a) factors which provide:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> (2) the need for the sentence imposed –
>
> > (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> > (B) to afford adequate deterrence to criminal conduct;
> > (C) to protect the public from further crimes of the defendant; and
> > (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

Booker makes these considerations critical now that the Guidelines are advisory; the statutory text is the chief governing standard set forth by Congress against which all sentences must be measured. And the purposes listed in subparagraph (a)(2)(A) – particularly "promot[ing] respect for the law" and "provid[ing] just punishment for the offense" – may be considerably undercut by a sentence based on a Guideline range enhanced for acquitted conduct.

A sentence based on acquitted conduct enhancements undermines the firmly established

public expectation that offenders are punished **only** for crimes of which they are convicted, and **not** for charges on which they are acquitted. Indeed, the notion that a defendant can be acquitted of serious charges against him, as here, and still be punished as if the jury had returned a conviction on those counts is, to all but lawyers schooled in the federal sentencing process, a shocking proposition. See *United States v. Lombard,* 102 F. 3d 1, 5 (1st Cir. 1996)(acknowledging that "as a matter of public perception and acceptance, [the use of acquitted conduct] can often invite disrespect for the sentencing process"); *United States v. Ibanga,* 454 F. Supp. 2d 532, 541 (E. D. Va. 2006)(commenting that use of acquitted conduct "'[drives] a wedge between the community's sense of appropriate punishment and the criminal sanction inflicted'". *United States v. Coleman,* 370 F. Supp. 2d 661, 671-73 & n. 14 (S. D. Ohio 2005)(noting that "consideration of acquitted conduct has a deleterious effect on the public's view of the criminal justice system [because a] layperson would undoubtedly be revolted by the idea"); and *United States v. Frias,* 39 F. 3d 391, 393 (2nd Cir. 1994)(Oakes, J., concurring)(calling acquitted conduct rulings a "jurisprudence reminiscent of *Allice in Wonderland.* As the Queen of Hearts might say, 'Acquittal first, sentence afterwards.'").

When considering whether a sentence "promote[s] respect for the law, "it is not sufficient for a district court (or an appellate court merely to assess and review a final Guideline range after an acquitted conduct enhancement to consider whether the raw total promotes respect for the law. Such a methodology – which the District Court followed in the case at bar – fails to capture the distinct harms that flow from heavy reliance on acquitted conduct enhancements (as

opposed to reliance on convicted or even uncharged conduct enhancements). Critically, enhancements that treat acquitted conduct exactly the same as convicted conduct, convey the deleterious message that acquittals are legally inconsequential; this message in turn promotes disrespect for the historic and esteemed role of juries in the American legal system. In addition to evaluating the sum-total Guideline range, a court needs specifically to consider whether the heavy reliance on acquitted conduct to arrive at that total helps promote, or detracts from, "respect for the law."

Reliance on acquitted conduct enhancements directly implicates the question whether such a sentence provides "just" punishment for the offense. First, it is questionable whether "just punishment" is achieved when acquitted conduct is "priced" exactly the same as convicted conduct, as is mandated by the Guidelines, without any discount to reflect the fact that a jury already rejected the charges. As a number of judges have observed, such treatment may violate basic fairness. See *United States v. Hunter,* 19 F. 3d 895, 898 (4th Cir. 1994)(Hall, J., concurring) (recognizing that "[a]s regards uncharged 'relevant conduct,' this pricing [at exactly the same level of severity as convicted conduct] is at best a poor policy choice; as regards charges on which the jury has acquitted the defendant, it is just wrong"); *United States v. Concepcion,* 983 F. 2d 369, 396 (2d Cir. 1992)(Newman, J., concurring)(observing that the Commission's decision to count acquitted conduct the same was "entirely unjustified"). Indeed the text of the SRA suggests a court can and should consider at sentencing the weight, quality, and ultimate persuasiveness to a jury of the evidence presented at trial. Circuit courts since *Booker* have indicated that a

sentencing court is free to take these factors into account in arriving at a fair sentence. See *United States v. Reuter,* 463 F. 3d 792, 793 (7th Cir. 2006)(Posner, J.)(recognizing that "[a] judge might reasonably conclude that a sentence based almost entirely on evidence that satisfied only the normal civil standard of proof would be unlikely to promote respect for the law or provide just punishment for the offense of conviction. That would be a judgment for the sentencing judge to make and we would uphold it so long as it was reasonable in the circumstances"); and *United States v. Dazey,* 403 F. 3d 1147, 1177 (10th Cir. 2005)(noting that "[d]istrict courts might reasonably take into consideration the strength of the evidence in support of sentencing enhancements, rather that (as in the pre-*Booker* world) looking solely to whether there was a preponderance of the evidence, and applying Guidelines specified enhancements accordingly").

Reliance on acquitted conduct enhancements to increase a sentence dramatically raises the question whether such a penalty can be fairly described as a sanction "for the offense," meaning the offense of conviction. The arguable justification for consideration of acquitted conduct at sentencing is that it reflects the "circumstances" of the offense of conviction, and it was this justification that prompted this Court to reject the Double Jeopardy challenge presented in *Watts* over a decade ago. But where a primary driver of the punishment is alleged conduct of which the defendant was acquitted, it is difficult to describe such a sentence fairly as punishment for the convicted offense.

For instance, in the case at bar, where a primary determinant of Fidel Gonzalez's sentence was the Cape Coral seizure of marijuana for which he was held

accountable, even though he was found **not** guilty of Count 2, the possession of marijuana charge based on that seizure. The reality is that Fidel Gonzalez is being sentenced for that charge, despite the jury's refusal to convict him based on the evidence presented at trial.

As highlighted above, the statutory text enacted by Congress in § 3553(a) indicates that a judge deciding whether to enhance a sentence based on acquitted conduct must consider carefully and with specificity whether the enhanced punishment will serve the purposes of sentencing set forth in the SRA. A requirement calling for additional reasoning to support a sentence based on acquitted conduct adds an important measure of accountability and legitimacy to the post-*Booker* sentencing system. Notably, in the recent ruling in *Rita v. United States*, 127 S. Ct. 2456 (2007), this Court emphasized the importance of a sentencing court's statement of reasons, especially as it related to promoting respect for the legal system: "The statute does call for the judge to 'state' his 'reasons.' And that requriement reflects sound judicial practice. Judicial decisions are reasoned decisions. Confidence in a judge's use of reason underlies the public's trust in the judicial institution. A public statement of those reasons helps provide the public with the assurance that creates that trust." *Id.* at 2468. Demanding a more detailed statement of reasons in cases involving significant consideration of acquitted conduct helps ensure that the federal sentencing system lives up to the "public's trust in the judicial institution." See *Gall v. United States*, 128 S. Ct. 586, 597 (2007)("[The sentencing judge] must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.").

II. THE SENTENCE IN THIS CASE, WHICH WAS SIGNIFICANTLY ENHANCED FOR ACQUITTED CONDUCT, IS UNREASONABLE BECAUSE THE DISTRICT COURT FAILED TO CONSIDER PROPERLY THE STATUTORY PURPOSES IN 18 U. S. C. § 3553(A).

The district court's sentence in this case exemplifies both the danger of treating acquitted conduct the same as convicted conduct, and the importance of an explicit consideration and measure of the application of all the § 3553(a) facts. Fidel Gonzalez was acquitted on Count-2, the possession of marijuana charge, in the Superseding Indictment. While the jury rejected the evidence of Fidel Gonzalez's involvement n that offense, the court sentenced him as if he had committed it.

Despite the highly problematic nature of his enhancement – which gave full credit to an offense of which Fidel Gonzalez not only was acquitted, but which at most reflected his co-defendant's conduct – the district court provided only a terse statement of its reasons at sentencing. While the court adopted a broad view of the underlying facts to determine that the total sentence complied with § 3553(a), it did not independently consider whether an enhancement attributable to that acquitted conduct itself advanced the goals of § 3553(a); it simply grouped acquitted conduct and convicted conduct together to decide that a higher sentence based on the full tally of all the marijuana plants in **both** Superseding Indictment Counts was in order. Nor did the court explain why it decided to price the acquitted conduct at full value as if it were convicted conduct. As such, there is nothing in the court's decision that explains why the sentence

was "sufficient but not greater than necessary" to promote respect for the law and provide just punishment for the offense of conviction. See 18 U.S.C. § 3553(a)(2)(A).

A Guideline sentence should not be deemed reasonable where the Guideline range is calculated based part on acquitted conduct. More specifically in light of the facts of this case, because the sentencing court failed to evaluate fairly and explain in detail whether and how the specific enhancement based on acquitted conduct itself would advance the central objectives of sentencing, the court's sentencing decision in this case was procedurally unreasonable.

CONCLUSION

The use of acquitted conduct to enhance a sentence violates the Sixth Amendment and the Due Process Clause of the Fifth Amendment of the Constitution and undermines the Notice requirement that is at the heart of any criminal proceedings wherein a defendant should have fair Notice to know the precise effect a jury's verdict will have on his punishment. It cannot possibly satisfy Due Process to permit the nullification of a jury's not guilty verdict, with respect to any given charge, by allowing a judge to thereafter use the same conduct underlying that charge to enhance a defendant's sentence. The tally of marijuana plants relative to the acquitted Count-2 were specifically used in the **total** tally of marijuana plants by the sentencing court in order to impermissibly satisfy the government's pleadings of the Count-1 Conspiracy involving over 1000 marijuana plants which resulted in Fidel Gonzalez's enhancement.

Accordingly, Fidel Gonzalez respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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